IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM KINZELL,
Petitioner,

Against

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT

HEMAN H. FIELD,
GEORGE W. KORTE,
Counsel for Respondent.

CASES CITED.

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OBJECTIONS TO PETITION.

The respondent, Chicago, Milwaukee & St. Paul Railway Company, prays that the application for writ of certiorari to the Supreme Court of Idaho be denied, because:

(a) The action is based upon the Federal Employers' Liability Act and seeks judgment for damages through the negligence of the respondent. The case is one in which there is no question as to the interpretation of any provisions of the federal act, or as to the definition of legal principles in its application, but simply involves an appreciation of all the facts for the purpose of determining whether there were matters for the consideration of the jury.

(b) The decision of the Idaho Supreme Court rests upon findings of fact, legitimate inferences and conclusions drawn from certain contested facts and the appreciation of the facts introduced in evidence which are final so far as this court is concerned.

(c) There is no substance in petitioner's claim of the denial of federal right, as no federal right was denied the petitioner at any stage of the proceedings in the state court, and this court is without jurisdiction to review the decision of the Supreme Court of Idaho.

(d) The right to apply for the discretionary writ has been waived by the failure of the petitioner to make use of and exhaust his whole remedy to correct the errors complained of, granted to him by the rules of practice and procedure in force before the State Supreme Court at the time the findings were made. (Supreme court rule 57; see appendix, page 20; *Maricopa & Phoenix Ry. vs. Arizona,* 156 U. S. 347, 352).

(e) The petitioner has not furnished a printed record, as required by the rules of this court, in that all the exhibits (Exhibits 5, 6 and 13) material to this application have been omitted and we have no way of bringing them to the attention of the court, except by reference to the original exhibits.

STATEMENT

The accident to the petitioner happened in the State of Washington. He was a member of a construction crew operating wholly within that state and he had no connection whatever with the maintenance of the roadbed or with the operation or movement of commerce

over the road. The original work carried on by this crew consisted in excavating for an independent line change near the station of Lone Pine, Washington (*Record,* 189; *Exhibit* 5.) Incidental to this work and because it was more economical in the long run, the material was wasted by dumping it under the wooden bridges in question and fell far short of filling the opening or space spanned by them (*Record,* 189). The material was not put there to strengthen the bridges (*Record,* 191); they were independent and were in as good condition as when built; the bridge engineer estimated the life of the timbers in the trestles to be about two years, and said that no changes would have to be made or repair work done on them before that time (*Record,* 193).

It was the judgment of the respondent that it would be more economical to make use of the material than to waste it to the side of the right of way where the excavation work was being carried on (*Record,* 189). It had along its right of way several wooden trestles which were subject to the hazards of fire and decay and were a constant menace to the lives and property which moved over them. The respondent determined that from the material so excavated, solid embankments should be built, either under or to the side of the wooden trestles, and that, when completed, the wooden trestles should be abandoned. It was a matter of improvement and nothing more, and may be likened to the building of a tunnel (234 U. S. 43) to do away with the hazards of slides, snow blockades and heavy grades, or, to the grading of a cut-off (217 Fed. Rep. 234) to avoid the hazards of operating trains over sharp curves, or, to the construction of an elevated track and

the abandonment of the surface grade to avoid the many hazards at street and highway crossings.

With the Lone Pine work out of the way, this same construction crew was moved to Ewan, Washington, where certain excavation work had to be done in advance of building new sidetracks, stockyards and other station facilities. For the same reason and for the same purpose and as an incident thereto, the material from this work was likewise moved and dumped under the two trestles (*Record*, 189, 190; *Exhibit* 6). There was more than enough material in this work to complete the two embankments commenced with the material taken from the Lone Pine work. After the embankments had sufficiently settled and conditioned themselves for use, the interstate track upon the trestles was first interfered with; the rails, the ties and the decks were torn up and removed and new ties and rails were laid upon the embankments; the wooden trestles were then abandoned and no future use made of them (*Record*, 188, 191). The embankments were not completed or used when petitioner met with his injury (*Record*, 190).

The whole work and the men employed were embraced within the Washington State Compensation Act, which makes provision for the satisfaction of all personal injuries received in the course of the work (*Washington Session Laws*, 1911, Chap. 74). The respondent was complying with that act and had paid to the State of Washington all the premiums and sums levied against it by the State of Washington, for personal injuries occurring on such work. The only relief afforded petitioner was under the local law in accord-

ance with its provisions, as pointed out in the case of *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43. That law took away from the courts of the State of Washington all right to review a suit for personal injury; and so this case was dragged into the courts of Idaho to avoid the Washington law, by the pretended plea that the work of excavation and construction of the embankments was the repair of the bridges, a *necessary* incident to the movement of interstate commerce, and the plaintiff a federal, instead of a state, employee (*Record*, 3, 4). Issue was joined on these questions of fact (*Record* 12, 13); a trial was had and the dispute was sent to the jury under a meaningless and misleading instruction (*Record*, 66, 67), although we had offered one based upon the facts involved (*Record*, 68, 69). Inflamed by the indecent demonstration (*Record*, 281) and the juggling experiments (*Record*, 279) ordered under stress of objections (*Record*, 272, 281), the jury returned a verdict for $35,000 in the face of the almost conclusive showing made by respondent that the petitioner was faking nine-tenths of his claimed injuries. The motion for a new trial (*Record*, 57) was ignored (*Record*, 75) and judgment for the full amount of the verdict was entered (*Record*, 19).

On appeal, the Supreme Court of Idaho reversed the outrageous judgment and ordered the case dismissed. In doing so, it considered only the dispute involving whether petitioner was embraced within the Washington State Compensation Act, or whether the Federal Employers' Liability Act should control. The court reserved all consideration of the many other assignments of error with the statement in the opinion that they

were "worthy of careful consideration" (*Opinion, Record,* 294.) In determining the dispute the Supreme Court, upon a review of all the evidence, found (*Opinion, Record,* 294) that the work of excavation at Ewan and Lone Pine was not repair work; that the bridges were in no state of disrepair; that it was new work in advance of construction, and that the use made of the material to construct the embankments under the bridges, in the very nature of things, could not be repair work, but work of construction and substitution; that the substitution did not occur until sometime after the embankment had settled and was in condition to receive the ties and rails upon which the trains moving commerce would be operated (*Record,* 190); that, so far as interstate commerce was concerned, it was a matter of indifference that the embankments were being built.

The opinion of the Supreme court recites the specific findings of fact (*Record,* 294):

> "The injuries complained of were received in the State of Washington while appellant was engaged in constructing a dirt fill beneath a wooden trestle known as Bridge 140, near the town of Ewan, Washington, which fill was intended eventually to support the track. The material with which the fill was being constructed was obtained from new construction work entirely within the State of Washington, and no question of interstate commerce was thereby involved. The fill had progressed to the extent that it had in places reached the railroad ties and it had become necessary, after dumping the cars of dirt, to use what is known as a 'bull-doser' to spread the dirt away from the track and thereby widen the fill. The 'bull-doser' employed in this case was a flat car with adjustable wings extending on either side from a point slightly over each rail and spreading out toward the back of the car.

The principal duty of respondent (Kinzell) was to adjust these wings, and, at times when they were waiting for another trainload of dirt, he and Hiram Lee, another employe upon the doser, used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about 25 'air dump' cars each. When the train approached the bridge it would couple on to the doser and proceed to the place where the dirt was to be dumped. After dumping the dirt, the cars would be righted and the train would start back, pulling the doser after it. The wings of the doser would level down the dirt dump, spreading it away from the track, and thus widen the fill.

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case, but, if it were true, it is but an incident to the work of making the fill and not a purpose in view in its construction. It is true, one of of the duties of the respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped, and which might, if allowed to accumulate, interfere with interstate commerce. This, however, was but an incident to the work of constructing the fill and did not change the character of the employment. The object of the work, as pointed out in the *Parker* case, is controlling."

The Court's conclusions find full support in the testimony of the superintendent and trainmaster of the respondent (*Record,* 188, 191), its engineer in charge of bridges and building (*Record,* 193, 194), in Kinsell's own admissions (*Record,* 87, 103, 104, 110, 111) and the Exhibits 5 and 6. The court was unanimous in its findings upon the facts involved. It resolved the dispute in favor of the respondent. These findings, so far as this court is concerned, are final.

BRIEF OF ARGUMENT.

The claim of federal right, upon which jurisdiction to review is asked, is wanting in substance.

An examination of the record shows that no construction of the Federal Employers Liability Act is involved. It is the settled rule of this court that when the question presented involves the findings of fact and the conclusions of the appellate state court upon the sufficiency of the evidence for the purpose of deciding whether there was evidence that the plaintiff was employed in interstate commerce, whether the defendant was negligent, or whether there was a jury question upon such matters, the application for writ of certiorari or other review will be denied.

In *Seaboard Air Line Ry. vs. Koennecke,* 239 U. S., 352, 355, it was claimed that there was no evidence that deceased was employed in interstate commerce, and this court said that "upon such matters, as upon questions of negligence and the like, brought here only because arising in actions on the statute and involving no new principle, we confine ourselves to a summary statement of results."

An examination of the petition for writ of certiorari, in *Southern Ry. Co. vs. McGuin,* 244 U. S, 654, will disclose that the questions upon which the application for the writ was based depended upon disputed facts, the sufficiency of the evidence and the findings of the lower court as to employment in interstate commerce, negligence and assumption of risk.

In *Great Northern Ry. Co. vs. Alexander,* 246 U. S., 276, the action was founded upon the federal act; jurisdiction to review the decision of the state supreme court

was denied because the claim of federal right of removal was too frivolous and wanting in substance.

For like reasons the application for writ of certiorari was denied the petitioner in the case of *Sanner vs. Western Maryland Ry. Co.*, 245 U. S., 661, where recovery was dependent upon the Federal Employers Liability Act.

Whether plaintiff was within the federal act, was involved in *Guy vs. Cincinnati Northern Ry. Co.*, 246 U. S. 668, and the right to the writ of certiorari was refused.

The application for writ of certiorari was denied the petitioner in the case of *Atlantic Coast Line Ry. vs. Tredway*, 245 U. S., 670.

In *Parmelee vs. Chicago, Milwaukee & St. Paul Railway*, 246 U. S., 658, the right to review was denied because the matters contained in the application for a review involved only an appreciation of the facts and the inferences to be derived therefrom. That case was affirmed without opinion and upon the authority of *Chicago Junction Ry. Co. vs. King*, 222 U. S., 222; *Seaboard Air Line Ry. Co. vs. Padgett*, 236 U. S., 668, 673; *Seaboard Air Line Ry. Co. vs. Koennecke*, 239 U. S., 352, 355; *Great Northern Ry. Co. vs. Knapp*, 240 U. S., 464, 466; *Baltimore & Ohio Railroad Co. vs. Whitacre*, 242 U. S., 169; *Gt. Northern Ry. Co. vs. Donaldson*, 246 U. S., 121.

The construction of better or improved instrumentalities as substitutes for those in use, whether it be bridges, tracks or rolling stock, is not a necessary incident to interstate transportation.

The decision of the Idaho Supreme Court based up

on its findings of fact is not in doubt, and, so far as the law is concerned, it needs no help on our part to sustain it. We cannot, by reviewing the extravagant notions of counsel for petitioner, make the opinion any plainer or more conclusive. It is manifest, from a reading of the opinion, that the Court has understood the facts and the decisions of this court which have dealt with the federal act. The opinion is supported by the cases which have come before this court, wherein the division line has been drawn between the employe belonging to the state and the employe controlled by the federal government. That a line must be drawn somewhere is certain, ever since the opinion in the 1st *Employers Liability Cases,* 207 U. S., 463. The states cannot be deprived of jurisdiction over those employes who have no immediate connection with the movement of interstate commerce and who have only to do with the work of constructing the things which might or might not be used as instruments in interstate commerce. The work performed in advance of their substitution and use by the railroad company has no relation to interstate transportation, and, therefore, employes connected with such work are subject to state control and must seek relief under the state compensation acts in those states where such laws have been enacted.

This court has often, and in different ways, stated the test to be applied in staking out the division line between a state and federal employe.

In *Shanks vs. Delaware & Lackawanna Ry. Co.,* 239 U. S., 556, it is significantly said that the act "speaks of interstate commerce not in a technical sense, but in a practical one better suited to the occasion." By this is meant that unless a practical view is taken of the

statute, it might include all the employes of an interstate railroad, whether or not they were necessarily connected with the movement of interstate commerce.

In *N. Y. Central Ry. vs. Carr,* 238 U. S., 260, it is mentioned that the work of the employe must be so directly and immediately connected with the movement of interstate commerce as "substantially to form a necessary incident thereof." The court's opinion is properly reflected in the use of the words "a *necessary* incident." A mere incident of a condition is one thing, a *necessary* incident is another. The distinction is important. The work of dumping excavation material under a wooden bridge, which, at some time in the future, but not before two years, might need repairs, may be an incident of the repairing, but it certainly is not a *necessary* incident; this, for the self-evident reason that the bridge is complete, in no state of disrepair; while the work of dumping is going on transportation of freight and passenger cars proceed thereon, and the business of interstate commerce is carried on without interference or interruption so far as the wooden bridge is concerned. That bridge is still an instrument of interstate commerce; the incomplete fill is not; and, until the bridge is abandoned and the embankment is used in its place, it remains an integral part of the railway track. The particular facts in the *Carr* case will demonstrate the force and effect of what is a *necessary* incident to the movement of interstate commerce in the opinion of this court.

The test in the *Carr* case, supra, was repeated in *Erie Ry. Co. vs. Welsh,* 242 U. S.. There it was held that whether the employe was performing an act so di-

rectly and immediately connected with interstate transportation "as to be a part of it or a *necessary* incident thereto, * * * depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a separate and indivisible task" (italics added).

In *Louisville & Nashville Ry. Co. vs. Parker,* 242 U. S., 13, it is said that the purpose or object of the work, and not the incidental acts connected with the real work being done, must control.

And so this court, in the case of *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.,* 243 U. S., 43,—which dealt with construction, substitution and improvement of railroad instrumentalities—said that "whatever doubt may have existed in the minds of some at the time the judgment below was rendered, under the facts as alleged, Raymond and the Railway Company were not engaged in interstate commerce." In that case, counsel for Raymond, as at bar, made the claim that, because the tunnel was an improvement over the surface grade for which it would be substituted, the work of boring the tunnel was, therefore, repair work, in that it would take the place of a railroad track which *sometime* would need repair or be worn out. Now, Raymond was doing work no different than that which the petitioner was doing; both were building a thing which, when finished, would take the place of another thing then used to move interstate commerce.

The like impractical notion was put forward in *Minneapolis & St. Louis Ry. Co. vs. Nash,* 242 U. S., 619; but the insistence was too frivolous to call for hearing or opinion. There, Nash, a member of a bridge crew,

was hurt while helping to bring a ready-made out-house from the shops to one of the stations along the line where it would have been installed as a substitute for an old one. The Minnesota court thought the work of carting the out-house from the shops to its final destination made such work a necessary incident to the movement of interstate commerce. It must be noticed that Nash was one step nearer to the division line than the work being done by the petitioner at bar, in that the out-house was finished and the embankment was not; the out-house was being brought to the place where it would be immediately substituted, while the embankment could not be substituted until it had settled, the deck and rails from the bridge destroyed and new ties and rails laid thereon, which last work was not done until long after the petitioner was hurt.

In *New York Central Ry. Co. vs. White,* 243 U. S., 188, a new station and new tracks were being constructed. White was hurt while guarding the tools used in doing the work. It is stated in the opinion that White's work "bore no direct relation to interstate transportation and had to do solely with construction work which is clearly distinguishable, as pointed out in *Pedersen vs. Delaware & Lackawanna Ry. Co.,* 229 U. S., 146, 162. And see, *Chicago, Burlington & Quincy R. R. Co., vs. Harrington,* 241 U. S., 177, 180. *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.,* this day decided, *ante,* 43. This point, therefore, is without basis in fact."

The Eighth Circuit Court had before it just such a question as is raised here in the case of *Bravis vs. Chicago, Milwaukee & St. Paul Ry. Co.,* 217 Fed. Rep., 234. Bravis was hurt while on his way home from the work

of constructing a bridge on a short cut-off which, when completed, would take the place of the main line then used in interstate commerce. He used a hand-car to go to his home and operated it on the main track. On his way he met a through train, and, before he could get his car off the track, a collision occurred. As in this case, it was maintained:—(*a*) That the work of building the cut-off was a necessary incident to the movement of interstate commerce, and, (*b*) That, in any event, the work of Bravis in removing the hand-car from the track aided interstate commerce.

The first claim was disposed of summarily, and the second was put aside by the statement that "Bravis bore the same relation to the defendant while he was on the hand-car that he would have borne to it if he had walked on the railway track with its permission and at his own risk on his way to and from his work."

The only difference between the work which Bravis was doing and that at bar is the distance in territory; the bridge upon which Bravis worked was off to one side, while the embankment in question, fortuitously, was being built immediately under the interstate track; but territorial limits cannot change the work of construction to that of repair. The question at bar might readily be solved by counsel for petitioner, if he would shut his eyes and imagine the embankment being built 100 feet from the bridge instead of under it. Again there is no difference in the claim made by Bravis and the petitioner in respect to the use of the track. Bravis maintained that unless he got the hand-car out of the way a wreck would occur, while petitioner claims that if he failed to remove the rocks or other particles left behind after the bull-doser had been used, a wreck

would also occur. That might be true if either Bravis or the petitioner failed to get out of the way of the train; but such incident cannot change the nature and purpose of the work which was being done.

The various state appellate courts seem to have no difficulty in understanding the purpose and intent of the federal act, and they are in harmony with the Idaho Supreme Court.

The Indiana Supreme Court, in the case of *Chicago & Erie R. R. Co. vs. Steele,* 183 Ind., 444, had before it an employe who was distributing ties along the right of way, for use in constructing a double or second track. The main line track was used by the work train upon which to dump the ties for distribution. Giving the statute a practical test, it ruled that such work was new construction and that it could not change the nature of the work because a tie fell upon the interstate track and was picked up by the employe and thrown to one side.

The Illinois Supreme Court, in the case of *Dickinson, Receiver, vs. Industrial Board,* 280 Ill., 342, found that the construction work carried on by the railroads in Chicago in the course of elevating their tracks above the surface grade, was new work in that "it was a matter of indifference, so far as interstate commerce in which the railroad was engaged was concerned, although the structure to be erected might be an instrument of such commerce."

In that case retaining walls were being built, into which earth material would be dumped so as to make a solid embankment which would be substituted for the

track then in use. We can see no difference between the substitute being built and the embankment in question.

The plea that the writ should issue because there is a conflict of decisions between the Supreme Court of Idaho and the Sixth Circuit Court of Appeal, is specious; no such conflict exists. The case from the Sixth Circuit which is claimed to be in conflict, is that of *Cincinnati, New Orleans & Texas Pacific Ry. Co., vs. Hall,* 243 Fed. Rep., 76. There an old bridge was in a state of disrepair and a new one was ordered to be immediately built in its place. The main track over which commerce moved was being interfered with by raising it high enough so that the timbers of the new one could be inserted in the place of the old ones,—work identical with that done in *Pedersen's* case, 229 U. S., 146, or work like that done in connection with the bridge in question after the embankment had settled and the tearing up of the deck and the rails and ties of the bridge and the laying of the new rails and ties upon the embankment occurred (*Record,* 190). The facts recited in the opinion in the *Hall* case (page 77) are:

> "Preparatory to the substitution of a new bridge for an old one, the defendant caused a cut to be made in the fill approaching the bridge and next to a stone abutment. The cut was to make a place for a wooden bent, which, with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and another permanent structure built in its place. To the end that traffic might not be interrupted, strong stringers were introduced under the ties to hold up the tracks; the ends on one side resting on the abutment and the other on the roadbed itself. Whether the ends of the stringers rested on a sill

or on top of the fill, the ties must have been lifted out of their positions in the slag, thus leaving depressions and heavy ridges in the slag."

The court was of the opinion that the removal of the old abutment and the construction of a new one in its place was not different from the taking out of the old bent and inserting the new one in *Pedersen's* case, 229 U. S., 146.

The other case mentioned as being opposed to the conclusions of the Idaho Supreme Court is that of *Southern Railway Co. vs. McGuin,* 240 Fed. Rep., 649 (C. C. A.), *certiorari denied* in 244 U. S., 653. That case well illustrates the necessity for some practical knowledge of railroading in order to view the statute in "a practical sense suited to the occasion." McGuin was a section hand, and, as stated in the opinion (240 Fed. Rep., at 650), "on the day, by direction of the track foreman, he was working with one Parati, a road engineer, who was surveying and setting stakes with the view of improving a curve by a slight change in the track. Parati completed the work by placing the stakes to guide the track men in changing the rails." It is manifest that the purpose of the work was the eventual repair of the main line track, and the act of the surveyor, in staking out the work, was a part thereof. No such work as that was going on in the case at bar; the fill in question had no relation to the movement of commerce until it was conditioned and put in use. So far as the movement of commerce is concerned, the fill might well have remained under the bridge unused until the bridge needed repair, or it may never have been used. It was a matter of indifference whether it would or would not be-

come an instrument in interstate commerce. So long as the wooden bridge had life and could be repaired, just so long would the fill be useless.

The case of *Columbia & Puget Sound R. R. Co. vs. Sauter,* 223 Fed. Rep., 604 (C. C. A.), mentioned in the brief, is not to the contrary. The Idaho Supreme Court correctly says of that case that "the main purpose of the work was directly connected with the transportation of interstate commerce." There a flood washed away the interstate track and the movement of all interstate trains was blocked until a temporary bridge could be built. The temporary bridge was being constructed when Sauter was hurt. The work would be no different than if the rails had been swept away and other rails were being laid. Such work, of course, is repair work, because commerce could not be transported until the work was done.

Finally, it is repeated here that the petitioner's work "in keeping the track clear of material which was dumped upon it was not a matter of indifference," and, if he failed to perform it well, a wreck might be caused, and that, therefore, he was doing something incidental to interstate commerce.

As pointed out in the *Carr* case, *supra,* such act was an incident, but not a *necessary* incident, to interstate transportation. It cannot change the purpose of the work, as pointed out in *Louisville & Nashville Ry. Co. vs. Parker,* 242 U. S., 13.

The fantastic contention was given no notice in *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.,* 243 U. S., 43, and is well disposed of in the opinion of

Bravis vs. Chicago, Milwaukee & St. Paul Ry. Co., 217 Fed. Rep., 234.

As well might petitioner claim that unless the bulldoser or the work train, or he himself, failed to get out of the way, a wreck was possible and interstate commerce would be affected. The real work carried on was the excavation for side tracks and stock yards at Ewan and the incidental deposit of the excavation material under the bridge in question for future use. The temporary use of the main line track upon which to deposit the dirt while being dumped below, cannot change the character of the work carried on at Ewan or the economical use made of the material in building the independent embankment.

The opinions of this court have so often laid aside the questions upon which the request for the discretionary writ of certiorari is asked, that there is no new principle involved and the findings and conclusions of the Idaho Supreme Court are final; therefore, the application for the writ should be denied.

Respectfully submitted,

Herman H Field

George W Korte

Counsel for Respondent.

APPENDIX.

IN THE

SUPREME COURT OF THE STATE OF IDAHO

WILLIAM KINZELL,
Respondent,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,
Appellant.

No. 3035

I, *I. W. HART,* Clerk of the Supreme Court of the State of Idaho, do hereby certify that in the above entitled cause the decision of said court was filed and final judgment entered on the 26th day of March, 1918, and that no application for a rehearing of said cause has been made or filed by the respondent William Kinzell or by his counsel in said supreme court of the State of Idaho.

WITNESS my hand and the Seal of the Court, this 31st day of July 1918.

(Seal) I. W. HART, Clerk.

"RULE 57. *Rehearing.* All applications for rehearing shall be upon petition, printed or typewritten, in the manner prescribed for briefs filed by counsel, setting forth wherein it is claimed that the court has erred. Such petition shall be presented within twenty days from the date judgment or order of the court is filed. Counsel may accompany the petition with a brief of the authorities upon which they rely in support thereof, but no oral argument will be heard thereon. With the petition the applicant shall file three printed or type-

written copies thereof for the use of the justices of the court, in addition to the original, and shall make the deposit with the clerk as prescribed by Rule 38. Counsel shall serve copy of such petition and brief upon the adverse party, but the adverse party shall not answer such petition or brief unless requested to do so by the court."

"RULE 38. *Filing Fees.* * * * Petitions for rehearing shall be accompanied by a filing fee of $5."

IN THE SUPREME COURT OF THE STATE OF IDAHO,

Clerk's Office.

I, I. W. HART, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above and foregoing printed rules numbered one to seventy-two (1 to 72) inclusive, comprise all the rules of practice of said court in force since the 10th day of February, 1918, and in force on the date of this certificate.

WITNESS my hand and the seal of the court this 31st day of July, 1918.

(L. S.) (Signed) I. W. HART, Clerk.

IN THE

SUPREME COURT OF THE STATE OF IDAHO

WILLIAM KINZELL,
Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,
Appellant.
No.———

The respondent being about to apply through the Supreme Court of the United States for a writ of certiorari, it is *ordered* that the remittitur in this case be stayed until the determination of said application.

ALFRED BUDGE,
Chief Justice.

Dated May 13, 1918.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original Order staying Remittitur in the above entitled cause, on the 13th day of May, 1918, and now on file in my office.

Witness my hand and the seal of the Court this 29th day of August, 1918.

I. W. HART, *Clerk.*

(Seal of Supreme)
(Court of Idaho)